

CANADA / JUDGMENT

Carby v. Benoit

2016 BCSC 1675

COURT

Supreme Court of British Columbia

DECIDED

12 September 2016

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2016 BCSC 1675 Carby v. Benoit IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Carby v. Benoit, 2016 BCSC 1675 Date: 20160912 Docket: M090895 Registry: Victoria Between: Alanna Janell Carby Plaintiff And: Richard Benoit Defendant

- and - Docket: M103312 Registry: Victoria Between: Alanna Janell Carby Plaintiff And: Judy Evelyn Nobel Defendant Before: Master Bouck (Sitting as Registrar) Reasons for Decision Counsel for the Plaintiff Alanna Janell Carby: R. Margetts, Q.C. Counsel for the Defendant Richard Benoit and appearing as agent for counsel for the Defendant Judy Evelyn Nobel: M. Henderson Place and Date of Hearing: Victoria, B.C. July 18, 2016 Place and Date of Judgment: Victoria, B.C. September 12, 2016 The Appointment

- [1] The plaintiff presents two bills of costs for assessment. In the Carby v. Benoit action, the plaintiff claims costs and disbursements of \$115,455.32. In the Carby v. Nobel action, the plaintiff's bill claims costs of \$9,420. By agreement, all disbursements relating to the two actions are claimed in the Benoit bill. The assessment follows the settlement of both actions on or about December 30, 2015. But for the settlement, the parties were proceeding to a 25-day trial before a judge and jury commencing January 4, 2016.
- [2] The appointment consumed one day. The Items and Disbursements in Dispute
- [3] The tariff items and disbursements in dispute were initially identified in correspondence from Mr. Benoit's counsel as follows: Units claimed in the Carby v. Benoit action: Item Units Claimed Units Recommended by Defendant 1 8 3 2 20 5 6 5 3 10 5 4 11 10 3 17 5 3 18 5 3 Units claimed in the Carby v. Nobel action: Item Units Claimed Units Recommended by Defendant 1 5 3 2 15 5 6 5 3 11 10 3 17 5 3 18 5 3 Disbursements: Date Description Amount May 26, 2010 Dr. Kahn - expedited assessment \$1,500.00 October 8, 2010 Dr. Rocheleau - Report \$917.00 March 2, 2012 Dr. Rocheleau - Report \$750.00 July 22, 2013 Binder for report request to Dr. Linda Ottley *\$8.00 July 22, 2013 Tabs for report request *\$2.40 November 5, 2013 Binder for Dr. O'Breasail *\$8.00 November 5, 2013 Tabs for Dr. O'Breasail *\$4.20 Decembers, 2013 Dr. Mark Hopkins - Consultation \$200.00 December 23, 2013 Dr. Strudwick - Consultation \$215.00 January 8, 2014 Dr. Levy report \$4,487.93 January 16, 2014 CML Healthcare MRI \$1,010.00 February 28, 2014 Associated Economic Consultants - Consumer Price Index \$165.00 February 28, 2014 Photocopies - Dr. Ottley's report *\$21.25 February 28, 2014

Photocopies - Corrected, Dr. Ottley's report *\$61.50 May 12, 2014 Associated Economic Consultants - Memo to assist at Mediation \$350.00 May 23, 2014 Dr. Vedova meeting with lawyers \$350.00 January 3, 2015 Dr. Levy report and travel \$24,048.81 February 3, 2015 Associated Economics - updated reports \$575.00 September 29, 2015 Binder and USB for Dr. Shuckett *\$16.00 October 13, 2015 Dr. Levy rebuttal report \$1,652.49 October 19, 2015 Dr. Rachapalli \$1,692.00 November 25, 2015 Dr. Wayne Shtybel report \$1,012.00 December 23, 2015 Dr. Vincent - trial preparation \$402.00 December 30, 2015 Associated Economics - Case discussions \$150.00 January 5, 2016 Dr. Levy - non-refundable travel expenses \$1,022.29 January 8, 2016 Barbara Phillips - Trial preparation \$60.00 January 11, 2016 Dr. Hopkins - trial preparation \$1,250.00

- [4] The plaintiff has abandoned her claim for the items marked with an asterisk above.
- [5] At the commencement of the assessment, the plaintiff sought to add a further charge of \$750 for the cost of a medical-legal report from Sharon Daly, a physiotherapist. The defence did not object to the amendment of the Benoit bill to now include this item. Background Facts
- [6] As evidence in support of the bills, the plaintiff relies on her own affidavit together with those of Mr. K. Walton, Q.C. and Dr. L. Ottley. Mr. Walton is lead counsel for Mr. Carby in these proceedings. Dr. Ottley is Ms. Carby's family doctor. The defendants rely on the affidavit of defence counsel's legal assistant. None of the affiants were asked to be produced for cross-examination purposes.
- [7] Mr. Walton's affidavit thoroughly canvasses the history of these two proceedings. For the sake of economy, I will not regurgitate all of that evidence, but may adopt certain portions of the affidavit in these reasons.
- [8] Ms. Carby is a 44-year-old married woman and mother of two teenage children. A long-time employee of the provincial government, Ms. Carby is presently off work and receiving long term disability benefits. Ms. Carby attributes her withdrawal from the workforce to the injuries suffered in two motor vehicle accidents.
- [9] The Benoit action concerns the loss and damage suffered by Ms. Carby following her involvement in an August 8, 2007 motor vehicle accident. Liability for that accident was admitted by the defendant. Ms. Carby was involved in a second motor vehicle accident on February 17, 2010, which in turn led to the commencement of the Nobel action. Liability for this second accident was initially denied but eventually admitted by that defendant in advance of trial.
- [10] By an order of the court made July 19, 2013, the two actions were joined for the purposes of trial. That trial was first set to proceed in May 2014 but was adjourned generally at a trial management conference. The defence served jury notices in each action and the corresponding fees had been paid for the January 2016 trial.

- [11] The plaintiff claims to have suffered a wide range of injuries in the accidents. As pled or identified in the medical-legal reports, those injuries include TMJ dysfunction, right shoulder impingement syndrome, mechanical mid-back and low back pain, involuntary displacement of ribs and hips, pain when swallowing and indicia of fibromyalgia. Subsequent to the accidents, Ms. Carby developed a dependency on narcotic drugs. Eventually, a diagnosis was made of chronic pain syndrome. During the course of various medical investigations, it was also determined that Ms. Carby has a genetic disorder called Ehlers-Danlos Syndrome ("EDS"). While not specifically pled, the theory of the plaintiff's case is that the injuries suffered in the motor vehicle accidents were made worse due to the pre-existing EDS.
- [12] The plaintiff put forward a significant future income loss claim based on the disabling nature of her injuries.
- [13] At paragraph 28 of his affidavit, Mr. Walton provides the following overview of the plaintiff's claims: 28 Generally speaking Ms. Carby's case was complex and difficult for a number of reasons:
- a) Ms. Carby suffered more than one would expect from the Benoit accident of August 7, 2007 such that she was off of work at various times for various durations and was off work from mid January 2010 onward;
 - b) She appeared to be recovering from the first accident although not completely when the second accident happened;
 - c) The second (Nobel) accident did her in from being potentially capable of recovery to not likely to recover at all. Her witnesses (referred to later in this affidavit at paragraph 141) spoke of the difference in her as being of a night and day variety;
 - d) Ms. Carby was diagnosed as having the rare genetic condition of Ehlers Danlos Syndrome (EDS) discovered to be present in her after the second accident;
 - e) The local geneticist who diagnosed Ms. Carby with EDS did not consider herself as possessing expertise to comment on whether a person with EDS would experience greater suffering because of that condition when driver of a vehicle rear-ended in two separate motor vehicle accidents;
 - f) That lack of expertise required the obtaining of evidence from another expert in genetics who was knowledgeable of EDS;
 - g) Initially treating Psychologist Dr. Boissevain refused to provide a medical -legal report until contact by plaintiff's counsel to the College of Psychologists required him to do so;
 - h) The Government of British Columbia (Ms. Carby's employer) wished to be repaid under subrogation for Ms. Carby's time off on Short Term Disability and Long Term Disability;

- i) The foregoing required information from the Government differentiating between times when Ms. Carby was off for a reason not connected with the accident and times she was off connected with her accident injuries;
 - j) Over at least an eighteen month period the Government of British Columbia was slow in responding to requests for proof of their claim;
 - k) Pacific Blue Cross wished to be paid for accident related payments it made and these had to be differentiated from the many payments made for non-related claims;
 - l) One of the factors blocking settlement (aside from no timely offer from the defendant as was expected after the Judicial Settlement Conference later referred to) was the attitude of the servants of the Province of British Columbia dealing with subrogation who had no apparent appreciation of why their claim had to be proven in court and seemed to feel that presentation of spread sheets was all that was needed;
 - m) Another difficulty was that Blue Cross whose payments to the plaintiff were funded by the Province took the position that any settlement would see an end to Ms. Carby's right to accident related extended health payments after the settlement were made. Just before the settlement was made Blue Cross modified its position to allow Ms. Carby to continue to claim accident related extended health expenses after the accident claim settled;
 - n) The defendant Benoit had Ms. Carby examined by Dr. Wade, a rheumatologist whose opinion differed dramatically from Ms. Carby's treating doctors which opinions required opinion medical-legal reports from treating neurologist, Dr. Shtybel and treating Rheumatologist Dr. Rachapalli as well as a rebuttal report from Geneticist, Dr. Levy;
 - o) Some of Ms. Carby's injuries from the first accident were worsened by the second accident while the second accident also resulted in new injuries;
 - p) Trial preparation was done twice, once for the May 2014 trial and a second time for the January, 2016 trial;
 - q) The January 2016 trial was set for twenty-five days before a jury;
 - r) Jury trials require substantially different preparation than is needed before a judge all of which was done by the time settlement was made.
- [14] The plaintiff consulted 19 experts and served 31 reports for trial purposes. The experts included Ms. Carby's family physician, two geneticists, three physiatrists, a pain specialist, a rheumatologist, a dentist, a dental specialist, a physiotherapist, a chiropractor, a psychiatrist, a rehabilitation specialist, and an economist.
- [15] In the course of settlement negotiations, the plaintiff suggested that she ought to receive damages in excess of \$2.4 million.

- [16] The defendants take issue with the inferences suggested by Mr. Walton in terms of the complexity of both the proceedings and the plaintiff's claim. The defence say that while the plaintiff may have suffered some minor to modest soft tissue injuries in the accidents, the ongoing disability is largely attributable to the pre-existing and active EDS condition.
- [17] The defendants appear to have accepted some part of the plaintiff's theory of the case as the settlement amount was \$750,000 "new money" plus costs. Discussion
- [18] Together, the parties cite nearly 30 common law authorities in support of their respective positions. All of the authorities have been reviewed but will only be cited in reference to a particular tariff item or disbursement.
- [19] The general principles to be applied in the assessment of tariff items are as described in *Parent v. Lohia*, 2012 BCSC 1677, and authorities cited therein at paras. 23-27. With respect to the assessment of disbursements, the general principles to be applied are as stated in *Turner v. Whittaker*, 2013 BCSC 712. The law with respect to the assessment of expert's charges is addressed in *Wheeldon v. Magee*, 2010 BCSC 491 at paras. 25-29.
- [20] On this assessment, there is also the issue of whether there is any overlap or duplication of the work claimed for in the two bills: s. 9 of Appendix B, *Farrokhmanesh v. Sahib*, 2010 BCSC 497. Although two separate bills are presented, the plaintiff acknowledges some overlap between the items claimed in each bill and has discounted those items accordingly.
- [21] In general, the defendants say that the plaintiff was overzealous or overcautious in the investigation and presentation of her claim. The defence does not present any evidence with respect to the reasonableness of the various experts' charges. Tariff Items Tariff Item #1 - Correspondence, conferences, etc. until the start of the proceeding
- [22] The plaintiff retained Mr. Walton on January 30, 2008, or about 13 months prior to the commencement of the Benoit proceeding. Mr. Walton provides an extract of his time records for this 13-month period. That evidence is helpful in determining what steps were taken in the pre-commencement stage, but the time spent on each task is not a tool for measuring the units to be awarded.
- [23] In addition to receiving instructions and providing legal advice, the pre-commencement steps taken by Mr. Walton included communications with the parties' insurers, the plaintiff's treating medical personnel and lay witnesses. I allow 5 units for this tariff item in the Benoit bill.
- [24] Ms. Carby retained Mr. Walton in the Nobel action one week after this second accident and a little more than five months before proceedings were commenced. Most of the steps taken in this five-month time period involved communications with treating medical personnel. I allow 3 units for this item in the Nobel bill. Tariff Item #2 - Correspondence, conferences, etc. from commencement of the process to completion of the trial or hearing

- [25] Plaintiff's counsel's time records are similarly provided to support this claim. The necessary and proper correspondence and communications regarding Ms. Carby's claims spanned from February 2009 to late December 2015. The plaintiff claims 20 units with respect to the Benoit action and 15 units for this category of steps taken in the Nobel action. I find that the plaintiff is entitled to the units as claimed in each bill. Tariff Item #6 - All process for commencing and prosecuting a proceeding
- [26] This item relates to the "process" as described in s. 1 of Appendix B.
- [27] The Benoit action was commenced by writ of summons on February 27, 2009. The writ does not contain a fast track endorsement. However, that endorsement does appear on the statement of claim issued by the plaintiff seven months later. The Benoit statement of defence also contains the fast track endorsement. The action must have been removed from fast track at some juncture in the proceeding.
- [28] While the writ's content might be considered pro forma, the statement of claim goes beyond the boiler-plate content typically seen in personal injury actions. The statement of claim reflects an effort by counsel to personalize the plaintiff's specific losses and also particularize the injuries suffered in the accident beyond merely identifying body parts. In my view, this type of pleading is not only proper but also reflects the appropriate effort of time and application of intellect by counsel in its preparation. The same comments and findings apply with respect to the notice of civil claim filed in the Nobel action. I allow the 5 units claimed in each bill for this item. Tariff Item #10 - Process for obtaining discovery of documents
- [29] In the Benoit action, the defendant disclosed 210 pages of documents. No list is provided by the defence in the Nobel action.
- [30] Although the number of documents listed by a party is some measure of the time ordinarily spent on this item, that is not the only measure. The nature of the documents themselves must be considered. Some documents will need to be carefully scrutinized for solicitor-client privilege claims. Others will be so benign, but yet relevant, that little time need be spent in their review: *Albert v. Conseil Scolaire Francophone de la Colombie-Britannique*, 2007 BCSC 928.
- [31] Upon review of the defendant's list and considering the nature of the documents disclosed, I allow 4 units for this item. Tariff Item #11 - Giving Inspection of Documents
- [32] The plaintiff issued ten lists of documents in the Benoit action and seven lists in the Nobel action. All told, the plaintiff disclosed to the defendants nearly 2,000 pages of documents. The plaintiff's lists include medical records, the collective agreement governing Ms. Carby's employment, various communications with Ms. Carby's disability insurance carrier, special damages receipts/invoices, CRA assessments and 48 photographs of the plaintiff inside and outside her home.

- [33] The document disclosure offered by the plaintiff in these two actions would be more time-consuming than many personal injury actions given the complicated nature of Ms. Carby's claim. However, I am unable to find that the nature of the documents disclosed justifies the maximum number of units. Many of the items listed are simple receipts that would take very little time for review before disclosure.
- [34] With respect to the Benoit action, I allow 7 units for this item. In the Nobel action, I allow 5 units. Item #17 - All process for retaining and consulting experts
- [35] The plaintiff claims 5 units in each proceeding with respect to this tariff item. Given the number of experts involved, I allow the units as claimed. I find that it was at least proper if not necessary for the plaintiff to consult with and retain the identified experts. Importantly, many of the experts were treating, rather than independent, physicians or medical personnel. Item #18 - All process for and correspondence associated with contacting, interviewing and issuing subpoenas to all witnesses
- [36] Ms. Carby intended to call 28 witnesses at trial. Five of those witnesses would not attend without be served with a subpoena. The plaintiff's claim for 5 units in each of the actions is allowed. Disbursements
- [37] The defence challenges the propriety or necessity of the plaintiff retaining various experts as well as the reasonableness of some of the experts' charges. In some instances, the defence relies on its own theory of the case in suggesting that a particular expert's report should not have been commissioned. While the plaintiff has the onus of proof on this assessment, it must also be remembered that the necessity and propriety of incurring a particular disbursement is judged on the circumstances at the time that the disbursement was incurred. And further, that the registrar is not to "step into the shoes" of the trier of fact and either weigh the evidence or opine on whether the defence's theory of the case ought to have prevailed at trial.
- [38] Various trial and meeting preparation charges from experts are in issue. The expenses relate to meetings with plaintiff's counsel or the individual expert's preparations for those meetings and trial. The defendants' submission is that most, if not all, of the experts who charged such fees are experienced witnesses and required little to no assistance from counsel in trial preparation. In addition, the defendants say that an expert need not review his or her file prior to a meeting with counsel and any resulting charges must be disallowed. There are two general answers to these objections. First, there is no evidence to support the contention that the individuals involved do not need to conduct trial preparation. Second, it is entirely proper for an expert to prepare him or herself prior to a meeting with counsel and certainly prior to trial.
- [39] Finally, the defence say that the plaintiff unnecessarily commissioned reports from experts in the same fields. For example, the plaintiff sought to introduce opinion evidence at trial from two rheumatologists and two physiatrists. The defence suggests that an opinion from only one expert in each of these fields was necessary or proper in the conduct of

proceeding. I disagree. Having reviewed the affidavit material, including the expert reports, I find that while there may have been some overlap in the opinions given, each of the experts relied on by the plaintiff offered an opinion on a distinct issue based on his or her specialized knowledge and expertise. Dr. Kahn's expedited report

- [40] In 2010, Ms. Carby was referred by Dr. Rocheleau to the Pain Program at Royal Jubilee hospital. The program was not willing to treat the plaintiff under the Medical Services Plan of B.C. However, Dr. Kahn, an anaesthetist and pain management specialist, was willing to offer a privately funded assessment. Mr. Walton chose to commission the assessment "because of the significant pain that Ms. Carby was experiencing." Ms. Carby says that she attended Dr. Kahn for an assessment but did not pursue any of the treatment recommended as the estimated cost was \$10,000.
- [41] Dr. Kahn provided a report to Mr. Walton in May of 2010. The report was not relied on at trial as it did not comply with SCCR 11-6.
- [42] While the plaintiff provides a copy of the cheque paid to Dr. Kahn for his services, no actual invoice is presented.
- [43] The defence says that Dr. Kahn's report was essentially useless due to the content's non-conformity with SCCR 11-6.
- [44] I find that Dr. Kahn's charges are in fact a private medical service rather than an aid in litigation. Although the charges might be considered an item of special damages in the actions, they are neither a proper nor necessary disbursement within the meaning of SCCR 14-1(5): *Phelan v. Newcombe*, 2007 BCSC 714 at paras. 16-17. The charges are disallowed. Dr. Rocheleau's Reports
- [45] The plaintiff was referred to this physiatrist by another physiatrist, Dr. McKean, for specific treatment (prolotherapy). Dr. Rocheleau treated the plaintiff for a two-year period starting in the summer of 2009. He issued medical legal reports on September 14, 2010, and February 27, 2012 (the dates are misidentified in the defendants' letter of objection).
- [46] Mr. Walton deposes that the treatment offered by Dr. Rocheleau was "probably important" to prove Ms. Carby's suffering and recovery from accident-related injuries. The defence says that the reports add nothing to either the diagnosis or prognosis of those injuries and merely duplicate Dr. McKean's opinion.
- [47] Having read the reports, I find that Dr. Rocheleau's reports are justified in that he opined on the specific issue of whether the prolotherapy aided Ms. Carby's recovery from the injuries suffered in the motor vehicle accidents. Dr. Rocheleau also provided the diagnosis of chronic pain disorder. Dr. Rocheleau's charges are allowed in their entirety. Dr. Mark Hopkins - Consultation and Trial Preparation

- [48] Dr. Hopkins is a TMJ specialist to whom Ms. Carby was referred by her treating dentist. Mr. Walton met with Dr. Hopkins to discuss whether a written report was required to assist the court on the correlation of the TMJ to either of the accidents. The defence characterizes that meeting as a discussion between counsel and Dr. Hopkins concerning Ms. Carby's medical treatment, although there is no evidence to that effect.
- [49] It is proper, if not strictly necessary, for counsel to meet with an expert to determine whether commissioning a report is prudent. The cost of attending at such a meeting, if reasonable, will be allowed even if no report is forthcoming.
- [50] I find Dr. Hopkin's charges to be reasonable and this disbursement is allowed. Dr. Strudwick Consultation
- [51] This charge also relates to a meeting between counsel and a proposed expert. The defence says that the meeting amounted to no more than a review of the doctor's records by plaintiff's counsel, a task which could have been accomplished without Dr. Strudwick's involvement and resulting charges.
- [52] Mr. Walton's evidence describes in detail the nature and purpose of his meeting with Dr. Strudwick. As with Dr. Hopkins, this meeting with a proposed expert was entirely proper in the conduct of the proceeding and involved more than a simple review of clinical records. The charge is allowed. Dr. Levy's charges
- [53] Dr. Levy's charges total \$31,211.52. The defence objects to all of these charges on the basis that the involvement of this geneticist was unnecessary. Alternatively, the defence says that Dr. Levy's charges are extravagant.
- [54] The plaintiff's affidavit material carefully canvasses the basis for retaining Dr. Levy. I am satisfied on that evidence that Dr. Levy's involvement with the plaintiff and his resulting evidence was necessary for the conduct of the proceeding. A central issue in the plaintiff's claim was the interplay between the EDS and the injuries and losses allegedly resulting from the accidents. In order to address this issue, the plaintiff sought an expert opinion on:
- a. what effect a sufferer of EDS may expect in terms of her ability to live a "normal" life; and
 - b. assuming the plaintiff's alleged injuries resulting from the motor vehicle accidents, would EDS play any part in Ms. Carby's recovery from those injuries?
- [55] The local geneticist first consulted by the plaintiff was unable to offer an opinion on these issues but referred Ms. Carby to some articles written by Dr. Levy. Dr. Levy happens to be a leading expert on EDS. He lives and practices in Baltimore, Maryland. The plaintiff says that there are no geneticists in private practice in British Columbia who might have been able to provide the required assessment and medical -legal opinion. All of the geneticists identified in the affidavit evidence on this assessment appear to be publicly employed. It is the unusual nature of the plaintiff's condition that necessitated retaining an expert outside of British Columbia. The defence must accept the plaintiff as they find her and that is with this EDS

condition.

- [56] Dr. Levy travelled to Victoria to examine the plaintiff. Ms. Carby's affidavit describes the reasons why she was physically unable to travel to Baltimore for that examination. Dr. Ottley promoted the idea that the examination be conducted in Victoria. Thus, while Dr. Levy's attendance for the examination added travel costs, I find that such charges are reasonable in the circumstances of this case.
- [57] There is no evidence from the defendants addressing the reasonableness of Dr. Levy's hourly rate and charges for various services, including the medical legal reports. The registrar may rely on experience in determining reasonableness of an expert's charges. However, the uniqueness of Dr. Levy's qualifications and expertise make such a determination impossible. Dr. Levy's charges are not disproportionate to the amount involved in the proceeding. That amount is not necessarily the settlement figure but rather plaintiff's counsel assessment of damages based on Ms. Carby being permanently disabled.
- [58] All of Dr. Levy's charges are allowed as presented. CML Healthcare - MRI
- [59] The plaintiff underwent a privately funded MRI in May 2014. Ms. Carby deposes that the MRI was pursued on the recommendation of Dr. Shuckett, her treating rheumatologist. In her medical-legal report dated July 16, 2013, Dr. Shuckett suggests that an MRI could confirm whether or not the plaintiff suffered a right labral tear. However, in that same report, Dr. Shuckett specifically recommends against pursuing the MRI. Ms. Carby saw Dr. Shuckett for the purposes of this medical-legal report in May 2013.
- [60] It would appear that Ms. Carby pursued an MRI on her own initiative or with the support of counsel. Either way, the disbursement was not reasonably incurred as the investigation falls into the "just in case" or "you never know" categories described in *Phelan v. Newcombe*.
- [61] Even if it was appropriate to pursue an MRI, the plaintiff has not justified the use of a private clinic for that purpose.
- [62] Ms. Carby deposes to having experienced an allergic reaction to the dye potentially used in MRI testing. Apparently, St. Paul's hospital in Vancouver does not use the dye. Ms. Carby was given a referral to an allergist to investigate the dye problem. The timing of that particular referral is not addressed in the evidence. However, it was not until December 2013 that Mr. Walton made inquiries about a publicly-funded MRI and was advised by the particular hospital that there was a waiting time of one year. Thus, the results of a publicly-funded MRI would not be available at the May 2014 trial. For that reason, the plaintiff pursued the MRI through CML Healthcare. The evidence does not address why there was no contact with St. Paul's or any other publicly-funded MRI providers between May and December, 2013. It is plausible that if such contact were made, Ms. Carby would have undertaken the MRI well before trial and avoided this additional cost. In the end, the MRI disclosed no labral tear.
- [63] This disbursement is disallowed. Associated Economic Consultants

- [64] The defendants object to Mr. Carson's charges relating to: a report on the present value of the rough upper limit for non-pecuniary damages; an aide memoire calculating Ms. Carby's past wage loss for plaintiff's counsel use at a mediation of the claims; up-dated reports on the upper limit present value (based on latest CPI) and the cost of future care following the adjournment the first trial; and time spent in discussions between Mr. Carson and a representative of the plaintiff's subrogation insurer.
- [65] I find that the commissioning of the reports addressing the present value of the upper limit of damages was overzealous on the part of the plaintiff. When the report and its up-date were commissioned, the plaintiff knew that the trial would be proceeding before a jury. As the legal research of plaintiff's counsel revealed, juries are not instructed on the upper limit in non-catastrophic cases. Objectively, Ms. Carby's claim does not fit within the legal definition of catastrophic: *Dilello v. Montgomery*, 2005 BCCA 56. If I am wrong on that point, it would also be unnecessary for the plaintiff to provide this evidence for the purposes of instructions. After all, the plaintiff would be seeking to maximize her claim for damages. It would be up to the defence to attempt to put some sort of cap on the non-pecuniary damages, either by inviting the trial judge to give instructions to the jury or on a post-verdict application. The charges relating to the two reports addressing the present value of the upper limit are disallowed.
- [66] The aide memoire was commissioned for plaintiff's counsel and is Mr. Carson's calculation of the plaintiff's past wage loss. Mr. Walton deposes that the past wage loss was "too time consuming and too complicated for counsel to calculate at the mediation". There is no evidence that any attempt was made by counsel to perform the calculation prior to the mediation. In my view, the plaintiff's past wage loss is a calculation that could have been performed by counsel and the charge for Mr. Carson's services is a luxury. This particular disbursement is disallowed: *Wheeldon v. Magee*.
- [67] The charges relating to the two reports addressing the cost of future care are allowed. The present value of the claimed costs is evidence properly put in evidence in a jury trial. It was also proper to up-date the original report for the purposes of the January 2016 trial.
- [68] The final disputed charge relates to Mr. Carson's time spent discussing the subrogation claims. Mr. Walton deposes that he first had such discussions with a representative of the provincial government Disability Management Program, but was unable to understand the employer's position. Accordingly, Mr. Walton retained Mr. Carson, as an economist, to follow up on those discussions and perhaps obtain some clarity on the matter. I am not persuaded that Mr. Carson's involvement in these discussions was necessary or proper in the conduct of the proceeding. Rather, that involvement is a luxury that ought not to be visited upon the defendants. This charge is disallowed. Dr. Rachapalli

- [69] Dr. Rachapalli was retained to rebut the opinion of his fellow rheumatologist, Dr. Wade, the latter having performed a defence medical examination. Specifically, Dr. Rachapalli was asked to address Dr. Wade's opinion that the plaintiff's ongoing symptoms were related to psoriatic arthritis and not caused by the accident.
- [70] Dr. Rachapalli had seen the plaintiff for a consultation in May 2012 so was somewhat familiar with Ms. Carby's history. He has previously opined that Ms. Carby suffered from fibromyalgia as a consequence to the injuries suffered in the accidents. Ms. Carby's family doctor believed that Dr. Rachapalli was best able to opine on the proposed diagnosis of psoriatic arthritis and made a referral accordingly.
- [71] I am unable to find that Dr. Rachapelli's report is somehow redundant or duplicative to the earlier medical-legal opinions provided by Dr. Shuckett. Further, given Dr. Wade's new diagnosis, a rebuttal opinion was properly commissioned. These charges are allowed. Dr. Schtybel
- [72] On a referral from her family doctor, Ms. Carby was examined by Dr. Shtybel sometime in 2012. Dr. Schtybel provided a consult report but the plaintiff chose not to commission a medical-legal report for trial. That strategy changed upon the plaintiff's receipt of Dr. Wade's report. In his report, Dr. Wade opines that Ms. Carby has "symptoms of slight thoracic outlet syndrome" which he attributes to deconditioning. Dr. Wade also states that in 2012, Dr. Schtybel had negated a finding of thoracic outlet syndrome. Through Ms. Carby, plaintiff's counsel determined that Dr. Wade may have been erroneous in his statement of the 2012 diagnosis. Indeed, Dr. Ottley had referred the plaintiff back to Dr. Schtybel to address this very finding. Accordingly, plaintiff's counsel concluded that a rebuttal report from Dr. Schtybel was necessary. The report was ordered on an expedited basis, with an invitation to Dr. Schtybel to charge a "higher fee than usual" because of the rushed nature of the request. Mr. Walton advised Dr. Schtybel that the report needed to be ready by October 18th. Ms. Carby was seeing the doctor four days before that date. As it turns out, Dr. Schtybel issued his report on November 23rd and appears to have charged for his services within the BCMA guidelines. In this report, Dr. Schtybel confirms his opinion that the plaintiff suffers from functional thoracic outlet syndrome and addresses the interplay of that syndrome with the EDS disorder.
- [73] I find that the plaintiff properly commissioned this report as a rebuttal to Dr. Wade's opinion. This disbursement is allowed as presented. Barbara Philips - Trial Preparation
- [74] This charge is allowed as presented. Dr. Verdova - meeting with lawyers
- [75] This charge relating to a medical-legal meeting is allowed. Dr. Hopkins-trial preparation
- [76] This charge is also allowed. Sharon Daly - medical-legal report - \$750

- [77] Ms. Daly is the plaintiff's treating physiotherapist. The plaintiff has presented two of Ms. Daly's reports in evidence at this assessment. Based on the content of those reports and the evidence of Mr. Walton, I find that the charges of Ms. Daly are proper and reasonable in the circumstances of this case. Summary
- [78] The disputed tariff items are allowed as follows: Units claimed in the Carby v. Benoit action: Item Units Claimed Units Allowed 1 8 5 2 20 20 6 5 5 10 5 4 11 10 7 17 5 5 18 5 5 Units claimed in the Carby v. Nobel action: Item Units Claimed Units Allowed 1 5 3 2 15 15 6 5 5 11 10 5 17 5 5 18 5 5
- [79] The following disbursements are disallowed: Dr. Kahn, expedited assessment; CML Healthcare MRI; Associated Economic Consultants, memo to assist at Mediation; reports addressing the rough upper limit of non-pecuniary damages; and December 30, 2015 Case Discussions. All other disputed disbursements are allowed as presented.
- [80] The parties have liberty to apply if they are unable to reach an agreement on the arithmetic resulting from these reasons. "C.P. Bouck" Master C.P. Bouck

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